Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BRUCE SMITH, as personal representative of Ingrid Smith, Deceased,

Petitioner,

vs.

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, also known as Jamahiriya Security Organization; and LIBYAN ARAB AIRLINES,

Respondents,

ABDEL BASSET ALI AL-MEGRAHI, and LAMEN KHALIFA FHIMAH,

Defendants.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Foreign Sovereign Immunities Act preclude a finding of waiver of immunity for extraterritorial terrorism directed against the United States?

2. Is extraterritorial terrorism, as evidenced in the bombing of Pan Am 103, conduct which forfeits sovereign immunity under § 1605(a)(1)?

3. Did Libya waive its immunity by becoming a guarantor of payment of a damage award against the two individual terrorists who planted the bomb?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bruce Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 26, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 101 F.3d 239 and is reproduced in the Appendix filed herewith ("App.") at App.A, 1a. That opinion affirmed the decision of the Eastern District of New York dated May 17, 1995, which is reported at 886 F. Supp. 306 and is reproduced at App.B, 20a.

JURISDICTION

This petition for a writ of certiorari was filed within ninety (90) days of entry of the judgment of the Court of Appeals dated November 26, 1996. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1604 (1994) provides that foreign states are immune from the jurisdiction of United States courts except where otherwise provided:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605 (1994) provides, in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; . . . .

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (Apr. 24, 1996), *codified at* 28 U.S.C. § 1605(a)(7), provides, in pertinent part:

> (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) the claimant or victim was not a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

STATEMENT OF THE CASE

This case is not about United States courts applying international law. It is not about finding an authority which overrides plain Congressional language. It simply seeks to apply a federal statute as it is written.

In the late 1950's through the early 1970's, there was a significant increase in highjackings of commercial airliners, which escalated into sabotage of commercial aircraft on the ground. *See generally* Andreas F. Lowenfeld, *Aviation Law* 8-3 to 8-122 (2d ed. 1981); *id.* at 1181-1257 (Worldwide Highjacking Statistics) (2d ed. Doc. Supp. 1981). In 1970, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft was approved by 74 states. Lowenfeld, *supra*, at 8-86 to 8-87. The Convention expressed "grave concern" about the threat to passenger safety of aircraft highjacking, worldwide, and called for contracting states to make this offense "punishable by severe penalties." Lowenfeld, *supra*, at 1145-1150 (Doc. Supp.). Both Libya and the United States ratified this Convention as contracting states. *Id.* In 1971, both the United States and Libya approved the Montreal Sabotage Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. It proscribed in similar terms, worldwide, aircraft sabotage and the causing of injury to passengers by such sabotage. *Id.* at 1151-1157.

On October 21, 1976, the 94th Congress passed, and the President signed, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ("FSIA" or "Act"). The Report of the House Judiciary Committee stated the Act's purpose as to

> codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis). This principle was adopted by the Department

> of State in 1952 and has been followed by the courts and by the executive branch ever since.

H.R. Rep. No. 94-1487 at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 ("House Report").

On December 21, 1988, a delayed detonation bomb exploded in the forward cargo hold of Pan American World Airways ("Pan Am") Flight 103 while en route from London to New York. The explosion caused the plane to break apart, killing all 259 passengers and crew, including Petitioner Bruce Smith's ("Petitioner") wife Ingrid Smith, as well as eleven persons on the ground in Lockerbie, Scotland.

The American and British governments, after conducting an extensive investigation, fixed responsibility upon Respondents: the Government of The Socialist People's Libyan Arab Jamahiriya ("Libya") and its agents, the Libyan External Security Organization ("JSO"), and Libyan Arab Airlines ("LAA") (herein collectively the "Libyan State Respondents"). Two Libyan intelligence operatives, Abdel Basset Ali Al-Megrahi ("Al-Megrahi") and Lamen Khalifa Fhimah ("Fhimah") also were implicated. This became a watershed event in identifying the serious peacetime threat such terrorism posed for international civilian travellers.

Al-Megrahi had been employed as an intelligence agent by the JSO for a number of years and at one time had been the head of the JSO's Airline Security Section. Fhimah also had worked for the JSO for several years in various intelligence positions. On November 13, 1991, Al-Megrahi and Fhimah were indicted by a federal grand jury for the bombing of Pan Am 103 – in their capacities

"as officers and operatives of the JSO." *See* Joint Appendix, submitted in support of Brief of Appellants in the Second Circuit ("2d Cir. Jt. App."), at 377-405.

In January, 1992, the United Nations Security Council adopted Resolution 731 branding the attack on Pan Am 103 as "international terrorism," and advised the Libyan Government (i) to surrender the two persons charged with implementing it; (ii) to "accept responsibility" for the bombing; (iii) to cooperate with member states in judicial proceedings relating to the bombing; and (iv) to "pay appropriate compensation" on account of Libya's terrorist attack. *See* 2d Cir. Jt. App., at 319-22. On March 31, 1992, the Security Council adopted Resolution 748, which formally "decides" that Libya "must now comply" with the earlier Security Council Resolution 731. *See* 2d Cir. Jt. App., at 315-18.

Despite its United Nations membership, Libya has repeatedly refused to honor these Security Council Resolutions. However, on February 27, 1992 – in response to the Security Council's decision that Libya "must pay appropriate compensation" to those victimized by its terrorism – Ibrahim M. Bishari, Secretary of the Libyan Government's "People's Committee for Foreign Liaison and International Cooperation," sent a letter (the "guaranty") to the UN Secretary General which stated:

> Despite the fact that discussion of the question of compensation is premature, since it would only follow from a civil judgement based on a criminal judgement, Libya guarantees the payment of any compensation that might be incurred by the responsibility of the two suspects who are its nationals [Al-Megrahi and

> Fhimah] in the event that they were unable to pay.

See 2d Cir. Jt. App., at 219.

In December 1993, at the groundbreaking ceremony for the Cairn at Arlington National Cemetery established in memory of the victims of the bombing, President Clinton expressed his commitment to holding accountable those responsible for this terrorist act:

> I say to you today that our nation will never stop pursuing justice against those who caused [the bombing] . . . for the attack on Pan Am 103 was an attack not only on the individuals from 21 nations who were aboard the aircraft, it was an attack on America.
>
> * * *
>
> It was clear to me as never before that the brutality of their crime only fortified your determination, and I can tell you it only fortifies the determination of your nation and its government. That is why we remain determined to see that those who murdered those who were aboard Pan Am 103 are brought to justice. . . .

Id. at 237-38.

Petitioner filed his initial complaint against the Libyan State Respondents, as well as Al-Megrahi and Fhimah, in the United States District Court for the District of Columbia on December 15, 1993; Petitioner filed his first amended complaint with the same court on June

8, 1994,[1] asserting claims against the Libyan State Respondents, Al-Megrahi and Fhimah, for compensatory and punitive damages under theories of wrongful death, battery, and infliction of emotional distress, and on the basis of Libya's undertaking to guaranty judgments against Al-Megrahi and Fhimah as described above. Petitioner asserted that subject matter jurisdiction over these claims was proper under 28 U.S.C. § 1330 and 28 U.S.C. § 1602 *et seq.*

On October 31, 1994, the Libyan State Respondents filed a motion under Fed. R. Civ. P. 12(b)(1), seeking dismissal of the *Smith* action for lack of subject matter jurisdiction. In response to the defense of sovereign immunity pursuant to the FSIA, the Petitioner pointed to a number of factors that render sovereign immunity unavailable, including that: (i) Libya's act of terrorism was without sovereign character, and thus constituted an implied waiver of sovereign immunity under 28 U.S.C. § 1605(a)(1); and that (ii) Libya's guaranty of any money judgment entered against Al-Megrahi and Fhimah also constituted an implied waiver of immunity.

The District Court rejected both of these contentions, without substantial discussion. Accordingly, the District Court held that it was without subject matter jurisdiction over the claims against the Libyan State defendants, and

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[1] On November 30, 1994, the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, ordered that the *Smith* action be transferred to the United States District Court for the Eastern District of New York, for coordination with other actions pending in that district.

that the actions should be dismissed. App.B, 38a. A judgment was entered on September 15, 1995, dismissing the Libyan State Respondents but leaving Al-Megrahi and Fhimah as defendants. App.C, 40a-41a.[2]

Petitioner filed a notice of appeal from the District Court's judgment with the United States Court of Appeals for the Second Circuit on August 18, 1995.[3] The Court of Appeals heard oral argument on these issues on March 28, 1996.[4]

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA" or the " '96 Amendment") which, among other things, amended the FSIA to provide that United States courts may exercise jurisdiction over foreign states in suits involving certain acts of terrorism. AEDPA, Pub. L. No. 104-132, § 221(a)(1), 110 Stat. 1214, 1241 (Apr. 24, 1996), *codified at*, 28 U.S.C. § 1605(a)(7). Specifically, under new § 1605(a)(7) of the FSIA, there is no sovereign immunity

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[2] To date, neither Al-Megrahi nor Fhimah have filed an answer or otherwise appeared. On December 12, 1996, Petitioner filed a Request to Enter Default against Al-Megrahi and Fhimah, pursuant to Fed. R. Civ. P. 55(a), with the Clerk of the District Court for the Eastern District of New York. On that same day, in accordance with Petitioner's Request, the Clerk signed a Certificate noting that Al-Megrahi and Fhimah are in default.

[3] Plaintiffs in a companion case, No. 95-7942 (2d Cir.), support this Petition.

[4] The argument was recorded and shown in its entirety on cable television by Court TV. A portion of the transcript of the Court TV videorecording is attached as Appendix D. A copy of the full tape is being lodged with the Clerk of the Supreme Court contemporaneously with the filing of this Petition.

with respect to suits for money damages against a foreign state for injuries or death caused by, among other things, an act of aircraft sabotage engaged in by agents of such foreign state. *Id.* Additionally, the '96 Amendment extended the statute of limitations for bringing suit to ten years after the date on which the cause of action arose, and was explicitly made retroactive.[5] *Id.* § 221(a)(2), (c); 28 U.S.C. § 1605(f).

On November 26, 1996, the Second Circuit Court of Appeals affirmed the District Court's decision and held, among other things, that in construing the FSIA, Congress "expected" the federal courts to limit the waiver exception to those circumstances where the foreign state's words or actions implying intent to waive immunity were "in relation to the conduct of litigation." App.A, 11a. The Court of Appeals found no such waiver here. App.A, 14a. It also found no implied waiver by Libya's written guaranty, since the guaranty did not evidence an intent to be bound in a United States court. App.A, 16a. Additionally, in the adoption of the AEDPA, the Second Circuit found no indication that the 94th Congress intended to allow waivers of sovereign immunity for all *jus cogens* violations since the 104th Congress provided for waivers of sovereign immunity only for selected *jus cogens*

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[5] There is some question as to whether Petitioner can take advantage of the provisions of § 1605(a)(7). Petitioner's wife was a United Kingdom national at the time she died on Pan Am 103, and § 1605(a)(7)(B)(ii) could be read to require that both the "claimant" (Petitioner) and the "victim" (his wife) must have been United States nationals at the time of the destruction of Pan Am 103.

violations.[6] App.A, 12a. The Court of Appeals thereby suggested that the '96 Amendment (passed after the dismissal of this case by the District Court) rather than the original FSIA was the only instrument for suits based on extraterritorial airliner terrorism. App.A, 12a.

Following the '96 Amendment, other families of the victims of the bombing of Pan Am 103 brought civil lawsuits against the Libyan State Respondents and Al-Megrahi and Fhimah. *See, e.g., Cummock, et al. v. The Socialist People's Libyan Arab Jamahiriya, et al.*, 96-CV-2993 (TCP) (E.D.N.Y.). On November 26, 1996, the Libyan State Respondents filed an Answer in the *Cummock* action asserting, among other things, an affirmative defense that the '96 Amendment is "constitutionally deficient and without force and effect." App.E, 56a.

REASONS FOR GRANTING THE PETITION

This Petition invites judicial supervision and reversal because the courts below, by ruling inconsistently with the reasonable interpretation of the plain language of the FSIA have, in effect, rewritten it. In so doing, the Court of Appeals has not only usurped the legislative function, but added to considerable existing confusion among the lower courts about the scope of waiver by implication under § 1605(a)(1) of the Act.

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[6] "A *jus cogens* norm is a principle of international law that is 'accepted by the international community of States as a whole as a norm from which no derogation is permitted. . . . ' " *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995) (internal citation omitted).

I. The Foreign Sovereign Immunities Act Does Not Preclude A Finding Of Waiver Of Immunity For Extraterritorial Terrorism Directed Against The United States.

The Second Circuit improperly narrowed the scope of the implied waiver provision by concluding – based on a single paragraph in the Act's House Report noting three examples of implied waiver – that Congress expected the courts to hold a foreign state to an implied waiver of sovereign immunity only for a state's actions "in relation to the conduct of litigation." App.A, 11a. This is the second recent court of appeals case to narrow the Act without support in the statutory text or legislative history. In *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 923 (1995), the District of Columbia Circuit held that although Germany's wartime torture and imprisonment of Hugo Princz, an American Jew, constituted a violation of a *jus cogens* norm of international criminality,[7] Germany's acts did not constitute an implied waiver of sovereign immunity because it did not meet what the court perceived to be the "intentionality requirement implicit in § 1605(a)(1)." *Princz*, 26 F.3d at 1173-74; *accord Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985). The *Princz* court noted that this "intentionality requirement" is reflected in the House Report's three

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[7] The *jus cogens* doctrine is discussed in the majority and dissenting opinions in *Princz; see also Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 939-40 (D.C. Cir. 1988).

examples and further observed that " '[s]ince the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity.' " 26 F.3d at 1174 (quoting *Frolova*, 761 F.2d at 377).

However, there is nothing in the legislative history itself that states or suggests that Congress intended the three examples of implied waivers in the House Report to be exclusive. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 721 (9th Cir. 1992) ("[t]he House Report does not purport to provide an exclusive list of the circumstances giving rise to implied waivers . . . and we have not construed it in this fashion"). Absent unequivocal indications to the contrary, examples invoked in legislative reports or debates are merely illustrative, not definitive. As this Court put it in *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990),

> the language of a statute . . . is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice. It is not, as the Court of Appeals apparently thought, a definitive interpretation of a statute's scope. We see no suggestion in the legislative history that Congress intended its list of examples to be exhaustive.

The Court of Appeals conceded that the text of § 1605(a)(1) "is not conclusive as to the [intended] meaning of an implied waiver," and that among the textually permissible meanings is "forfeiture," under which "the law *deems* an actor to have surrendered a protection,

regardless of the actor's subjective or objectively reasonable intent."[8] App.A, 9a (emphasis added).[9] Moreover, the court acknowledged, at least implicitly, that nothing in the legislative history forecloses a reading of the statute that encompasses the concept of forfeiture. *Id.; see also* App.D, 42a-43a, 48a-50a. This is a somewhat different analysis from that of the majority in *Princz* because the District of Columbia Circuit did not specifically address the issue of forfeiture, or waiver by operation of law. Nonetheless, the Court of Appeals purported to find in the sparse legislative record[10] "important clues" suggesting that Congress may indeed have intended to rule out "forfeiture" as an acceptable synonym for implied

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[8] The Second Circuit specifically declined to decide whether subjective or objective intent on behalf of the foreign state is required before an implied waiver will be found. App.A, 10a-11a.

[9] Petitioner submits that the phrase "waiver by operation of law" may be preferable to, if less sonorous than, "forfeiture." As explicated by the Court of Appeals, however, the latter term conveys reasonably the Petitioner's contention as to the proper interpretation of § 1605(a)(1). *See* App.A, 9a.

[10] The brief reference to implied waiver cited by the Court of Appeals is the *only* substantive discussion of the concept in the legislative history. This Court has noted before the relatively "obtuse" language of the FSIA, and the fact that the Congressional intent is not illuminated significantly by the legislative history. *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1478 (1993). Indeed, the legislative history, to the extent relevant, makes clear that Congress intended fully to "leave . . . the courts with very modest guidance" as to any legislative intention not apparent on the face of the statutory text. *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the House Comm. on the Judiciary*, 94th Cong. 53 (1976).

waiver. App.A, 9a, 13a. The wholly equivocal and unilluminating snippet from the legislative history of the FSIA does not support the court's conclusion that § 1605(a)(1) must be read to import a requirement of "intentionality," or to preclude waivers of immunity by operation of law. The Second, Seventh, Ninth and District of Columbia Circuits thus have established inconsistent and confusing approaches to analyzing FSIA's implied waiver provision – particularly on the issue of whether it must be read to include only intentional and/or litigation-related waivers.[11]

There is nothing to suggest that Congress intended that the term "waiver" should carry anything other than – or, certainly, anything less than – its ordinary meaning. In American jurisprudence, the word "waiver" long has encompassed constructive waivers, waivers by operation of law, and the concept of a forfeiture occasioned by conduct inconsistent with a right or principle. *See, e.g., Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184, 192-96 (1964) (state impliedly waives Eleventh

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[11] A sampling of district court decisions on the scope of FSIA's implied waiver exception further illustrates the breadth of the existing confusion and the inconsistent approaches to this issue, especially with regard to any intentionality requirement. *Compare Marlowe v. Argentine Naval Comm'n*, 604 F. Supp. 703, 709 (D.D.C. 1985) (FSIA does not require "express and unambiguous consent" to jurisdiction) *with Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex. 1985) (implied waiver rarely found without strong evidence that this is what the foreign state intended), *aff'd*, 826 F.2d 415 (5th Cir. 1987) *and Castro v. Saudi Arabia*, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (waiver of sovereign immunity must be "intentional and knowing").

Amendment immunity and "must be taken to have . . . consented" to suit by operating railroad, even though "[s]tate did not intend to waive . . . or know that . . . waiver would result"), *overruled on other grounds sub nom., Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987); *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362-65 (1955) (pre-FSIA immunity itself is a matter of "implied consent" of territorial government); *see also Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (defendant's voluntary absence from courtroom impliedly waives right to be present at trial).[12] Indeed in the context of other sovereign immunity issues, this Court long ago adopted the principle that a state's participation in non-sovereign activity *ipso facto* "waives all the privileges" – including immunity from suit – otherwise enjoyed by sovereign states. *The Bank of The United States v. The Planters' Bank of Georgia*, 22 U.S. (9 Wheat) 904 (1824).

The Court of Appeals purported to find here "clues" to Congress' intent. Much more than that is required to rebut the presumption that Congress used words in their ordinary, established sense. *See Resolution Trust Corp. v. Diamond* 45 F.3d 665, 672 (2d Cir.) ("absent contrary indications, Congress intends to adopt the common law definition of statutory terms" (citing *United States v. Shabani*,

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[12] Forfeiture or waiver of rights and immunities by operation of law is commonplace in the criminal law. *See generally* Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. Pa. L. Rev. 473, 497-514 (1978); Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214, 1239-59 (1977).

115 S. Ct. 382, 384 (1994))), *cert. denied*, 115 S. Ct. 2609 (1995); *see generally* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.01, at 83 (5th ed. 1992).

It would be surprising draftsmanship were Congress to use a general waiver provision like § 1605(a)(1) rather than delineating specific instances, if in fact its intent was to limit the exception to those instances. *Cf. Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985) ("a statute should be interpreted so as not to render one part inoperative") (internal citation omitted). Perhaps the Court of Appeals below felt obliged to apply the precept, which finds *no* support in the legislative history, that implied waivers are to be construed "narrowly." Even if that principle is valid, it can *only* be relevant where a subjective intentional waiver is urged, since subjective intent is often difficult to read from words and actions. The "narrow" construction principle should have no bearing on implied waiver by operation of law. With respect, the Court of Appeals ignores this Court's teaching just last term in *Felker v. Turpin*, 116 S. Ct. 2333, 2337 (1996), where a broad interpretation of Congress' intention to narrow habeas corpus review was made to give way to a plain reading of a clear statute. This alone justifies the importance of review in this case.

II. Extraterritorial Terrorism Is Conduct Which Forfeits Sovereign Immunity Under § 1605(a)(1).

This Court has never addressed the question of the scope of waiver under § 1605(a)(1) of the Act, let alone whether the Act, as supplemented by the '96 Amendment, permits implied waiver by operation of law to strip

a foreign state of sovereign immunity when accused of extraterritorial terrorism against American victims. Section 1605(a)(1) should strip Libya of immunity for the bombing of Pan Am 103 because extraterritorial terrorism is not an act *de jure imperii* – not a sovereign or "public" act of a government.

It is not necessary for the language of § 1605(a)(1) to specify what kinds of non-sovereign conduct waives immunity. If extraterritorial terrorist bombing can reasonably be determined to be a non-sovereign or private act, immunity should be waived by implication of law, in keeping with settled jurisprudence under the restrictive theory of sovereign immunity. The House Report on which the Court of Appeals relied notes explicitly that the FSIA must be read to incorporate a principle of implied waiver to limit immunity "to cases involving acts of a foreign state which are sovereign or governmental in nature." House Report, at 14.

In one of the earliest cases applying a restrictive theory of sovereign immunity within our federal system, Justice Marshall said

> [i]t is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests [sic] itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Planters' Bank, 22 U.S. at 907. There is nothing in the text or background of § 1605(a)(1) to suggest this same principle should not apply under that section. By engaging in extraterritorial terrorism, Libya descended to a level of misconduct in which states do not engage as sovereigns, divesting it of its sovereign immunity. Sovereign states may engage in two kinds of activity: activity which only governments can do, and acts which private individuals also can lawfully do. The former are immune from suit under the restrictive theory of sovereign immunity; the latter are not. When, as here, a state engages in conduct which is neither, the cloak of immunity cannot be worn.

The principle that a state can lose its immunity by engaging in non-sovereign conduct is reflected explicitly in § 1605(a)(5). This section divests a state of immunity for certain non-commercial torts occurring in the United States where conduct is outside the scope of an employee's official duties. In the application of this principle, courts have refused to apply discretionary function immunity to governmental acts that cannot be characterized as conduct appropriate for a sovereign. *See, e.g., Liu v. Republic of China*, 642 F. Supp. 297, 305 (N.D. Cal. 1986) ("The killing of Americans residing in the United States is not a policy option available to foreign countries.")

The scholarship on the distinction between acts *de jure imperii* (public law or sovereign nature) and *de jure gestionis* (private law or non-sovereign nature) is extensive. As Sir Hersh Lauterpacht wrote, acts *de jure imperii* "might include legislative, executive and administrative acts undertaken by foreign states whose effects were felt largely within their own territory. . . . " Theodore R.

Giuttari, *The American Law of Sovereign Immunity* 186 (1970). Libya professes opposition to international terrorism and denies complicity in it. *See* 2d Cir. Jt. App., at 218. This reinforces the inference that any participation by Libya in an airline bombing is non-sovereign. In discovery and at trial, Libya will be free to offer evidence, if any can be mustered, that its participation is sovereign. However, no such determination should be made at the pleadings stage.

The universal condemnation of international terrorism is so extensive and unequivocal as to preclude any state, acting as a state, from engaging in it. The two international conventions relating to aircraft highjacking and sabotage, and the two U.N. Security Council Resolutions calling Libya to account for international terrorism, express that no state has the right to engage in such conduct as a sovereign. The concept of state sovereignty rests on two principles: (1) a state's right to control conduct within its territory (the territoriality principle); and (2) the might of a state gives it no excuse to ignore the rights of other sovereigns. *See generally* J. L. Brierly, *The Law of Nations* 132, 162 (6th ed. 1963). Extraterritorial terrorism is not accorded sovereign status under either principle. Brierly observes that the doctrine of the equality of states does not mean a state has equal rights with every other state and an equal say in holding conduct legal or not. *Id.* at 132-33. That, he says, would be "mischievous." *Id.* at 132.

In 1822, Justice Story, to whom Justice Marshall referred for an understanding of international law, applied the restrictive theory of sovereign immunity

when he observed that a foreign sovereign had "no absolute right" to avoid another nation's jurisdiction. Otherwise, he said, such empowerment would endow a foreign state with "sovereign power beyond the limits of his own empire. . . . " *The Santissima Trinidad*, 20 U.S. (7 Wheat) 283, 352-354 (1822). Section 1605(a)(5) respects the territoriality principle by waiving immunity for ordinary noncommercial torts. That limitation, however, is not expressed in § 1605(a)(1), when the tortious conduct is extraterritorial terrorism aimed at the United States or the other terrorist torts the 104th Congress has specified in § 1605(a)(7).

In individual cases decided before the FSIA, when the State Department was silent as to its views of immunity, courts were generally capable of distinguishing between private and public conduct. For example, in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), the court observed that acts *de jure imperii* "are generally limited to the following categories: (1) internal administrative acts, such as expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activity, [and] (5) public loans." *Id.* at 360; *accord Sea Transport Corp. v. S/T Manhattan*, 405 F. Supp. 1244, 1246 (S.D.N.Y. 1975). The designation of a safe harbor in Spain by a branch of the Spanish Commerce Ministry, for discharge of surplus wheat obtained by the Spanish government from the United States Department of Agriculture, was held to be a non-sovereign act. 336 F.2d at 360-63. In addition,

United States courts regularly make such distinctions in deciding what is a foreign act of state. *Id.* at 362-63.[13]

Perhaps unnecessary confusion has been caused by the argument offered in *Princz*, and in the court below, that *jus cogens* norms of international law must be read in § 1605(a)(1) as grounds for implied waiver. *Princz*, 26 F.3d at 1174-75 & n.1; *Smith*, App.A, 6a-8a. The plaintiff in *Princz* argued that § 1605(a)(1) of the Act should be interpreted to imply a waiver where a violation of *jus cogens* norms has occurred, because to do so would reconcile the Act with accepted principles of international law. *Princz*, 26 F.3d at 1174. Judge Douglas Ginsburg doubted whether Congress had such an intention in 1976 and whether *jus cogens* is sufficiently well-established to be incorporated in United States statutory or decisional law without more explicit Congressional direction. *Id.* In dissent, Judge Wald accepted the plaintiff's argument and found it reasonable to read the Act in this manner. *Id.* at 1184-85 (Wald, J., dissenting).

This Court declined to review the issues in *Princz*. *See* 26 F.3d 1166, *cert. denied*, 115 S. Ct. 923 (1995). The circumstances of *Princz* are very different. The essential factual difference is that Libya's illegality is continuing. Germany had long since repudiated Nazi atrocities and had

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[13] The notion that certain "official" non-commercial acts are nonetheless non-sovereign in character is also accepted in the context of American federal-state relations. For example, a state official that would otherwise enjoy Eleventh Amendment immunity for his or her acts, loses that immunity if the act violates the Constitution. *Ex parte Young*, 209 U.S. 123, 159 (1908).

established a scheme of reparations by which many billions of dollars had already been distributed to victims. *See generally Princz*, 26 F.3d at 1172. Here, Libya denies responsibility for its conduct, the same regime is still in place, and no reasonable scheme of compensation has been proposed. In any event, it is unnecessary to find *jus cogens* embodied in U.S. law for there to be an implied waiver under § 1605(a)(1). This case can be decided by looking at the plain text of the Act, the precedent for implied waiver by forfeiture in United States law that supports the restrictive theory of sovereign immunity (explicitly affirmed in the FSIA), and the lack of foundation for the speculation that it somehow is necessary as a policy matter to read the language of § 1605(a)(1) with a judicially-imposed narrowing.[14]

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[14] Judge Ginsburg invoked a policy consideration which he believed justified him in reading the statute to require intentionality. If we follow the route of a broader construction, we will open our federal courts to:

> countless human rights cases that might well be brought by the victims of all the ruthless juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations.

Princz, 26 F.3d at 1175 n.1. The policy interest in deterring extraterritorial terrorism by giving the families of victims the private right to self-help has now been endorsed by both the President and the Congress in the '96 Amendment, in a manner fully consistent with the purpose and language of the FSIA.

The Court of Appeals invited the United States to file an amicus brief in this case. Although it should have been irrelevant, the Legal Adviser's Office of the State Department and the Civil Division of the Justice Department expressed concern over the "foreign policy implications" of allowing this action to be maintained under § 1605(a)(1). Amicus Brief for United States Government, at 4. The concern expressed – that the United States will be at greater risk in foreign courts by applying § 1605(a)(1) expansively – is unpersuasive. Governmentally-sanctioned extraterritorial terrorism of civil aviation in times of peace is distinguishable from acts of war. No foreign court could draw any precedent to use against the United States from allowing this action to go forward.[15]

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[15] Libyan State Respondents have indicated the intention to challenge the constitutionality of the '96 Amendment. App.E, 56a. It is important that this Court address now the proper scope of the FSIA's implied waiver provision because if the '96 Amendment is stricken as unconstitutional, American citizens will be subject to state-sponsored extraterritorial terrorism without recourse to hold outlaw states legally responsible for their actions. There is reason for concern that if § 1605(a)(1) of the FSIA does not support Petitioner's jurisdictional claim, it may make it easier for Libya to succeed in its constitutional challenge. That possibility can and should be forestalled in the interests of upholding legislative constitutionality and dispelling uncertainty, making this Petition ripe for review.

III. Libya Waived Its Immunity By Becoming A Guarantor Of Payment Of A Damage Award Against The Two Individual Terrorists.

The statement by Libyan official Bishari guaranteeing payment of any judgment entered against Al-Megrahi or Fhimah (*see* pp. 6-7 above) is an implied waiver of its immunity from suit to enforce its responsibility as their guarantor. Without analysis, the Court of Appeals concluded that

> [t]hough a guaranty is somewhat related to the litigation context illustrated by the three examples of implied waiver in the House Report, the paragraph in Mr. Bishari's letter does not bear such a close relationship to litigation as to support an implied waiver.

App.A, 16a. It also found the guaranty to be made in a setting removed from any acceptance of responsibility in a court of the United States. App.A, 16a. The Court of Appeals' conclusion that an implied waiver can be found only when a foreign state's actions are "in relation to the conduct of litigation," is a misinterpretation of the FSIA, and a distorted analysis of whether the guaranty constituted an implied waiver of Libya's obligation to pay a judgment against the two individuals.

The Libyan guaranty, addressed to a worldwide audience, can be presumed to have been intentional and carefully prepared. It reflects Libya's subjective intent to obligate itself and to waive its sovereign immunity should it be looked upon to make good on the guaranty. The provision does not contain any limiting conditions. In keeping with the structure of the letter as a whole, it

must be read on its own, with no imported conditions. In addition to the operative language offering the guaranty, it contains only Libya's (incorrect) factual explanation as to the sequence and timing of the events through which the individuals' civil liability would likely arise: Libya apparently believed that civil liability proceedings would necessarily await the outcome of a criminal trial. The clause does not state or suggest that Libya would have declined to extend the guaranty had it known its assumption to be incorrect, and in fact the word "despite" established that the assumption was not material to the decision to issue the guaranty.

The offer of a guaranty bears a close relationship to litigation because it necessarily implies that the guarantor contemplates the possibility of being haled into court and saddled with liability. *See, e.g., David & Hagner, P.C. v. DHP, Inc.*, 171 B.R. 429, 435 (D.D.C. 1994) ("conventional" implications of a guaranty are that the guarantor is "liable" upon default of the primary obligor), *aff'd*, 70 F.3d 637 (D.C. Cir. 1995). There is no reasonable way to read an undertaking unqualifiedly accepting liability for a damage judgment other than as an acceptance of the process necessary to enforce that liability. Libya's guaranty is no different: it should be taken as a promise acknowledging Libya's potential judicial liability as a guarantor – most certainly an act "in relation to the conduct of litigation."

There is, at the very least, a factual issue as to whether in making this guaranty, Libya itself contemplated being sued in United States courts. Libya guaranteed payment of judgments entered against Al-Megrahi and Fhimah. It is not credible that Libya did not foresee

the possibility, if not the likelihood, that civil liability against Fhimah and Al-Megrahi might well be found in a United States court. The overwhelming majority of victims were American residents. To find *implied* waiver, it is not necessary that the guaranty contain a single word about submitting to litigation in United States courts. *Cf. Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1022-23 (9th Cir. 1987) (finding of implied waiver from lease agreement relating to U.S. property). Such a requirement would read the concept of implied waiver out of the FSIA entirely; the concept of *implied* obligation rests upon the notion that conduct alone may be "instinct with obligation." *Wood v. Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917). Thus, even under the Court of Appeals' own interpretation of implied waiver, Libya's compensation guaranty operated to waive its sovereign immunity, at least as to its liability as a guarantor of judgments against Fhimah and Al-Megrahi.

CONCLUSION

This Court has yet to determine the proper scope of § 1605(a)(1). Confusion in interpreting its meaning, and errors in textual interpretation is widespread in the courts below. Extraterritorial terrorism is a serious and increasing problem for our nation. The need for clarification of the availability of waiver of immunity under the FSIA for states engaging in terrorist acts is special and important.

For the foregoing reasons, Petitioner Bruce Smith respectfully prays that this Court issue a writ of certiorari

to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1241, 1572, 1573 – August Term 1995

Argued: March 28, 1996 Decided: November 26, 1996

Docket Nos. 95-7930, -7931, -7942

BRUCE SMITH, as personal representative of Ingrid Smith, deceased and on behalf of all others similarly situated; PAUL S. HUDSON, personal representative of the Estate of Melina K. Hudson, deceased; BRUCE D. ABBOTT; ET AL.,

Plaintiffs-Appellants,

-v.-

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, also known as Jamahiriya Security Organization; LIBYAN ARAB AIRLINES,

Defendants-Appellees,

ABDEL BASSET ALI AL-MEGRAHI, also known as Abdelbaset Ali Mohmed, also known as Adbelbaset Ali Mohmed Al Megrahi, also known as Mr. Baset, also known as Ahmed Khalifa Abdusamad, also known as Abd Al-Basit Al-Magrahi, and LAMEN KHALIFA FHIMAH, also known as Al Amin Khalifa Fhimah, also known as Mr. Lamin,

Defendants.

Before:

NEWMAN, *Chief Judge*,
OAKES and PARKER, *Circuit Judges*.

Interlocutory appeal from the May 17, 1995, judgments of the United States District Court for the Eastern District of New York (Thomas C. Platt, Jr., Judge) dismissing appellants' complaints against Libya for lack of subject matter jurisdiction. Appellants alleged that Libya was responsible for the 1988 bombing of Pan Am Flight 103. District Court upheld immunity under Foreign Sovereign Immunities Act. 886 F. Supp. 306 (E.D.N.Y. 1995).

Affirmed.

TIMOTHY C. RUSSELL, Washington, D.C. (Douglas E. Rosenthal, Daniel N. Segal, Daniel J. Shonkwiler, Sonnenschein Nath & Rosenthal, Washington, D.C.; Douglas R. Rutzen, Int'l Center for Not-for-Profit Law, Washington, D.C.; Michael Reisman, Yale Law School, New Haven, Conn.; Allan Gerson, Mark S. Zaid, Washington, D.C.; Richard Emery, Andrew Celli, New York, N.Y.; on the brief), *for plaintiffs-appellants*.

JOHN R. BARTELS, JR., Bartels & Feureisen, White Plains, N.Y. (Robert C. Mirone, Mirone & Shields, New York, N.Y.; Abdelhay Sefrioui, Abdelhay et Anne Sefrioui, Paris, France, on the brief), *for defendants-appellees*.

(John F. Welsh, Scott A. Birnbaum, Richard S. Sanders, Testa, Hurwitz & Thibeault, Boston,

Mass.; Nathan Levin, Julie L. Mendel, submitted a brief for *amicus curiae* International Association of Jewish Lawyers and Jurists (American Section)).

(Johnathan B. Schwartz, Linda Jacobson, Mary Catherine Malin, Office of the Legal Adviser, U.S. Dept. of State, Washington, D.C.; Frank W. Hunger, Stephen W. Preston, Douglas N. Letter, Freddi Lipstein, Civil Div., U.S. Dept. of Justice, Washington, D.C., submitted a brief for *amicus curiae*, United States of America).

JON O. NEWMAN, *Chief Judge*:

In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), this Court ruled that a violation of certain fundamental norms of international law can be redressed by a civil suit brought in a United States district court against *private citizens* under the Alien Tort Act, 28 U.S.C. § 1350 (1994). The pending appeal presents the issue of whether such violations can be redressed by a civil suit brought in a United States district court against *a foreign state*. The more precise issue is whether such a suit – brought primarily on behalf of victims of an aircraft bombing – is prohibited by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1994), as it read prior to the recent amendment that explicitly permits suits against foreign states in some circumstances for acts in violation of fundamental international norms such as aircraft sabotage, *see* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (1996) (to be codified at 28 U.S.C. § 1605(a)(7)).

The representatives of two persons who died as a result of the bombing of Pan American ("Pan Am") Flight 103 over Lockerbie, Scotland, in 1988 and a group of former Pan Am employees appeal, pursuant to Fed. R. Civ. P. 54(b), from judgments of the District Court for the Eastern District of New York (Thomas C. Platt, Jr., Judge), dismissing their suits against The Socialist People's Libyan Arab Jamahiriya, Libyan Arab Airlines, and The Libyan External Security Organization (collectively "Libya") for lack of subject matter jurisdiction. We affirm.

Background

We have previously considered lawsuits by the families of victims of the bombing of Pan Am Flight 103 brought against Pan Am for the carrier's role in permitting a suitcase containing a bomb to be loaded onto the aircraft. *See In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804 (2d Cir. 1994). This appeal concerns three lawsuits alleging that the government of Libya, acting through its agents, deliberately caused the bombing. The plaintiffs are Bruce Smith, suing as representative of Ingrid Smith, his deceased wife (No. 95-7930), Paul S. Hudson, suing as representative of Melina K. Hudson, his deceased daughter (No. 95-7931), and Bruce D. Abbott and other former pilots, co-pilots, flight engineers, and flight attendants of Pan Am (No. 95-7942). Smith, Hudson, and the former Pan Am employees are all citizens of the United States. Smith brings his lawsuit on behalf of a class of family members of all passengers and crew members killed in the bombing.

The complaints allege that the Libyan governmental defendants, acting principally through two Libyan agents, Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah, planned and carried out the bombing of Pan Am Flight 103. Al-Megrahi and Fhimah have been indicted in the District of Columbia for their roles in the bombing.

The three lawsuits were originally filed in the District Court for the District of Columbia and transferred to the Eastern District of New York. On motions by the three Libyan state defendants to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, the *Smith* and *Hudson* suits were dismissed. *Smith v. Socialist People's Libyan Arab Jamahiriya,* 886 F. Supp. 306 (E.D.N.Y. 1995). This ruling was made applicable by stipulation to the *Abbott* suit. The three dismissals were certified for entry of final judgment pursuant to Fed. R. Civ. P. 54(b) because the suits remain pending against Al-Megrahi and Fhimah.

Discussion

The parties are in agreement that the issue of Libya's amenability to suit in a United States court is governed by the Foreign Sovereign Immunities Act ("FSIA"). The FSIA "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The FSIA recognizes the immunity of foreign states, 28 U.S.C. § 1604, subject to specified exceptions. The appellants advance four bases for asserting jurisdiction over Libya – (1) implied waiver, *id.* § 1605(a)(1), arising from Libya's alleged participation in actions that

violate fundamental norms of international law; (2) implied waiver, *id.* § 1605(a)(1), arising from Libya's alleged guaranty of any damage judgment against the individual defendants; (3) occurrence of the alleged bombing on "territory" of the United States, *id.* § 1605(a)(5); and (4) conflict with the United Nations Charter, *id.* § 1604.

1. Implied Waiver for *Jus Cogens* Violations

The FSIA removes the immunity of a foreign state in any case "in which the foreign state has waived its immunity either explicitly or by implication." *id.* § 1605(a)(1). The appellants contend that an implied waiver has occurred by virtue of Libya's violation of fundamental international norms (*"jus cogens"*). Libya concedes, for purposes of this appeal, that its alleged participation in the bombing of Pan Am Flight 103 would be a violation of *jus cogens,* but it contests the premise of appellants' argument that such a violation demonstrates an implied waiver of sovereign immunity within the meaning of the FSIA.

The contention that a foreign state *should* be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards is an appealing one. The argument was persuasively developed a few years ago in the *California Law Review. See* Adam C. Belsky *et al., Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law,* 77 Cal. L. Rev. 365 (1989). The argument is premised on the idea

that because observance of *jus cogens* is so universally recognized as vital to the functioning of a community of nations, every nation impliedly waives its traditional sovereign immunity for violations of such fundamental standards by the very act of holding itself out as state:

> *Jus cogens* norms . . . do not depend on the consent of individual states, but are universally binding by their very nature. Therefore, no explicit consent is required for a state to accept them; *the very fact that it is a state implies acceptance.* Also implied is that when a state violates such a norm, it is not entitled to immunity.

Id. at 399 (emphasis added).[1]

The issue we face, however, is not whether an implied waiver derived from a nation's existence is a good idea, but whether an implied waiver of that sort is what Congress contemplated by its use of the phrase

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[1] The argument for implied waiver based on a *jus cogens* violation has sometimes been articulated as resting on the idea that the foreign state impliedly waives its sovereign immunity, not by existing as a state within the community of nations, but by taking the action that constitutes the *jus cogens* violation. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1179 (D.C. Cir. 1994) (Wald, J., dissenting) ("Germany implicitly waived its immunity by engaging in the barbaric conduct alleged in this case. . . . "); Brief of Amici Curiae The Anti-Defamation League *et al., quoted in Princz*, 26 F.3d at 1173 ("A foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign.").

Presumably, the proponents of the argument mean that a state impliedly waives its immunity for *jus cogens* violations by holding itself out as a state within the community of nations, and that its violation of *jus cogens* standards is the act for which it is liable.

"waive[r] . . . by implication" in section 1605(a)(1) of the FSIA. We have no doubt that Congress has the authority either to maintain sovereign immunity of foreign states as a defense to all violations of *jus cogens* if it prefers to do so or to remove such immunity if that is its preference, and we have no doubt that Congress may choose to remove the defense of sovereign immunity selectively for particular violations of *jus cogens*, as it has recently done in the 1996 amendment of the FSIA. To determine which course Congress chose when it enacted the FSIA in 1976, we examine first the terms of the statute and then the legislative history.

The text of section 1605(a)(1) is not conclusive as to the meaning of an implied waiver. It simply says that a foreign state shall not be immune in any case in which the foreign state has waived its immunity "either explicitly or by implication." We and other courts have observed that "the implied waiver provision of Section 1605(a)(1) must be construed narrowly." *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991); *see Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022-23 (9th Cir. 1987); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985).

The concept of an "implied" waiver can have at least three meanings. First, such a waiver can mean that an actor intended to waive a protection, even though it did not say so expressly. Second, an implied waiver might arise whenever an act has been taken under circumstances that would lead a reasonable observer to conclude that the act generally manifests an intent to waive,

whether or not the actor had such intent in the particular case. Both of these meanings involve a requirement of intentionality, the first being subjective and the second objective. A third meaning is that the law deems an actor to have surrendered a protection, regardless of the actor's subjective or objectively reasonable intent. "Waiver" in this third sense is more properly termed "forfeiture." *See Forman v. Smith*, 633 F.2d 634, 638 (2d Cir. 1980). The text of the FSIA gives no indication as to the sense in which waiver "by implication" is used.

The legislative history of the FSIA provides important clues as to Congress's meaning. The Report of the House Judiciary Committee includes the following:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

H. R. Rep. No. 94-1487, at 18 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617 ("House Report").

The House Report conveys two messages. First, the initial reference to circumstances in which "the courts" have found implied waivers arguably suggests that Congress was adopting whatever meaning courts have given, and perhaps might in the future give, to the concept of an implied waiver. That message is countered, however, by the fact that the House Report goes on to point out that,

though some courts have allowed foreign states unilaterally to rescind waivers, the FSIA adopts the "better view" prohibiting such unilateral rescissions. *Id.* Plainly, Congress was not accepting all judicial interpretations of waiver.

Second, and more significantly, the House Report catalogues the types of action that were thought to exemplify an implied waiver. All three examples – agreeing to foreign arbitration, agreeing to apply foreign law to contract interpretation, and filing a responsive pleading without asserting an immunity defense – share a close relationship to the litigation process. On this appeal, the parties have taken opposing positions on whether an implied waiver must be subjectively intentional or whether waiver will be implied from conduct that objectively demonstrates an intention to waive. The three examples in the House Report do not definitively resolve that issue. For example, a state agreeing to apply foreign law to contract interpretation might subjectively intend to allow suit in the jurisdiction whose law applied, or might subjectively intend to be sued only in its own courts, albeit with the law of a selected jurisdiction applied; even if the state subjectively had the latter intent, the act of agreeing to apply foreign law could still be considered an objectively reasonable indication of the state's intent to be sued in the jurisdiction whose law applied. Whether subjective or objectively reasonable intent, or even in some circumstances forfeiture, was contemplated by Congress in enacting section 1605(a)(1), an issue we need not

decide,[2] the three examples are persuasive evidence that Congress primarily expected courts to hold a foreign state to an implied waiver of sovereign immunity by the state's actions in relation to the conduct of litigation.

Whether or not an implied waiver might, in some circumstances, arise from a foreign state's actions not intimately related to litigation, we conclude that Congress's concept of an implied waiver, as used in the FSIA, cannot be extended so far as to include a state's existence in the community of nations – a status that arguably should carry with it an expectation of amenability to suit in a foreign court for violations of fundamental norms of international law.

The appellants vigorously argue that Congress would not have wanted to condone, by insulating from legal redress, such outrageous violations of *jus cogens* as the bombing of a passenger aircraft. The emotional power of that argument is not persuasive for at least two reasons. First, Congress's use of the concept of implied waiver in a sense less expansive than permitting suit for all violations of *jus cogens* is not equivalent to condonation of such lawless conduct. Congress might well have expected the response to such violations to come from the political

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[2] We have previously given some indication that the requisite intent is subjective. *See Drexel Burnham Lambert Group Inc. v. Committee of Receivers*, 12 F.3d 317, 327 (2d Cir. 1993) (quoting with approval statement in *Frolova*, 761 F.2d at 378, that "waiver would not be found absent a conscious decision to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so"). Two other circuits have so ruled. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); *Frolova*, 761 F.2d at 377-78.

branches of the Government, which are not powerless to penalize a foreign state for international terrorism. Second, when Congress recently amended the FSIA to remove the sovereign immunity of foreign states as a defense to acts of international terrorism, it enacted a carefully crafted provision that abolishes the defense only in precisely defined circumstances. For example, the new amendment withdraws the defense only for specified acts of terrorism, applies only to foreign states designated by the Secretary of State as a state sponsor of terrorism, and limits recovery to damages for personal injury or death, without extending to the damages for economic injury sought by the *Abbott* appellants. *See* AEDPA § 221(a). Mindful that subsequently enacted legislation might not be a reliable guide to the intent of a prior Congress, *see United States v. Price*, 361 U.S. 304, 313 (1960), we nevertheless can rely on the recent amendment at least as an indication that Congress can legislate to open United States courts to some victims of international terrorism in their suits against foreign states without inevitably withdrawing entirely the defense of sovereign immunity for all *jus cogens* violations.

Moreover, we have been instructed that subsequent Congressional actions "should not be rejected out of hand as a source that a court may consider in the search for legislative intent." *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980). It is arguable that the action of the 104th Congress in removing the sovereign immunity defense for *some* violations of *jus cogens* is an indication that the 94th Congress had not intended to remove the defense for *all* such violations. *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) ("views of subsequent

Congresses . . . are entitled to significant weight"). Even if that inference is not drawn, we can rely on the recent amendment at least as evidence that Congress is not necessarily averse to permitting some violations of *jus cogens* to be redressed through channels other than suits against foreign states in United States courts.

Our reluctance to construe the concept of implied waiver to include all violations of *jus cogens* is not grounded, however, on an inference from the action of the 104th Congress; it is based on our understanding of what the 94th Congress meant when it illustrated the inexact phrase "waive[r] . . . by implication" with examples drawn entirely from the context of conduct related to the litigation process. We recognize that the examples given in the House Report are not necessarily the only circumstances in which an implied waiver might be found. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 721 (9th Cir. 1992). Nevertheless, they indicate the principal context that Congress had in mind, *see id.* at 720 (remanding for consideration of implied waiver based on initiation of malicious criminal proceedings against FSIA plaintiff and request to United States court for judicial assistance), and, at a minimum, they preclude a sweeping implied waiver for all violations of *jus cogens*.

Two circuits have considered whether a violation of a *jus cogens* standard constitutes an implied waiver within the meaning of the FSIA, and both have rejected the claim. *See Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); *Siderman de Blake*, 965 F.2d at 714-19. *Princz* rejected the claim on the D.C. Circuit's view that an implied waiver under the FSIA will be found only where a foreign state intended to permit suit. *See*

Princz, 26 F.3d at 1174 ("[T]he *amici's jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)."). [3] *Siderman de Blake* reasoned that the Supreme Court's decision in *Amerada Hess* precludes viewing *jus cogens* violations as an implied waiver. 965 F.2d at 718-19. That contention is questionable since no claim of waiver arising from a *jus cogens* violation was made in *Amerada Hess*. Though the Court there ruled that "immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions," *Amerada Hess*, 488 U.S. at 436, the Court was not asked to determine whether a *jus cogens* violation could constitute an implied waiver within the meaning of section 1605(a)(1). Our rejection of the claim that a *jus cogens* violation constitutes an implied waiver within the meaning of the FSIA rests neither on reading a subjective "intentionality" requirement into section 1605(a)(1), nor on the precedent of *Amerada Hess*. It rests on our understanding that Congress did not intend the implied waiver exception of section 1605(a)(1) to extend so far, however desirable such a result might be.

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[3] In dissent, Judge Wald accepted an intentionality requirement but concluded that "Germany could not have helped but realize that it might one day be held accountable for its heinous actions [in World War II] by any other state, including the United States." *Princz*, 26 F.3d at 1184. It is not clear in what sense she viewed "intentionality"; it is unlikely that Germany, before the Nuremberg trials, formed a subjective intent to be sued for wartime atrocities, and it is at least uncertain whether it would be objectively reasonable to attribute such an intent to it. Judge Wald appears to be using "implied waiver" in the sense of "forfeiture."

2. Implied Waiver from Alleged Guaranty of Damages Judgment

The appellants contend that Libya impliedly waived its immunity from suit in United States courts by reason of the following paragraph contained in a February 27, 1992, letter from Ibrahim M. Bishari, Secretary of the Libyan government's "People's Committee for Foreign Liaison and International Cooperation" to the Secretary General of the United Nations:

> Despite the fact that discussion of the question of compensation is premature, since it would only follow from a civil judgement based on a criminal judgement, Libya guarantees the payment of any compensation that might be incurred by the responsibility of the two suspects who are its nationals in the event that they were unable to pay.

This paragraph concerning guaranty of payment of a judgment against Al-Megrahi and Fhimah was contained in a three-page document that included proposals concerning handing the suspects over to a "third party," and various steps relating to "the issue of terrorism."

Libya rejects the claim of an implied waiver arising from the guaranty provision for several reasons. First, Libya contends that the letter is an integrated document, subject to conditions, and was not accepted by the United Nations. Second, Libya asserts that even if the guaranty paragraph can be considered as an independent proposal, it is not binding for lack of consideration. Third, Libya contends that even if a binding guarantee obligation arose, there was no waiver of immunity from suit in the courts of the United States to enforce such an obligation.

We agree with the third contention and do not consider the other lines of defense. The paragraph in Mr. Bishari's letter concerning a guaranty of payment contains no express or indirect reference to a waiver of sovereign immunity. *See Amerada Hess,* 488 U.S. at 442-43 ("[W]e [do not] see how a foreign state can waive its immunity under § 1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in the United States courts or even the availability of a cause of action in the United States."). Though a guaranty is somewhat related to the litigation context illustrated by the three examples of implied waiver in the House Report, the paragraph in Mr. Bishari's letter does not bear such a close relationship to litigation as to support an implied waiver. If a foreign state undertook to guarantee payment of a judgment entered against its nationals in a United States court, the argument for an implied waiver would be much stronger. A generalized undertaking to pay the debt of a national, however, does not imply that the guaranteeing state agrees to be sued on such an undertaking in a United States court.

3. Occurrence on "Territory" of the United States

The FSIA removes immunity "in any case . . . in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state . . . . " 28 U.S.C. § 1605(a)(5). The Act defines the "United States" to include "all territory and waters, continental or insular, subject to the jurisdiction of the United States." *Id.* § 1603(c). Appellants contend that Pan

Am Flight 103 should be considered to have been "territory" of the United States for purposes of the FSIA. They rely on the principle that a nautical vessel "is deemed to be a part of the territory" of "the sovereignty whose flag it flies." *United States v. Flores*, 289 U.S. 137, 155 (1933).

Even if we assume, without deciding, that for some purposes an American flag aircraft is like an American flag vessel, *but see United States v. Cordova*, 89 F. Supp. 298, 301 (E.D.N.Y. 1950), the fact that a location is subject to an assertion of United States authority does not necessarily mean that it is the "territory" of the United States for purposes of the FSIA. Cases rejecting FSIA jurisdiction over foreign states for torts committed at United States embassies make this point clear. *See Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 839-42 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587-88 (9th Cir. 1983). If FSIA immunity prevails with respect to torts in United States embassies, it cannot be displaced with respect to United States aircraft flying over a foreign land. Moreover, in *Amerada Hess*, the Supreme Court declined an invitation to equate "territory . . . of the United States," for purposes of the FSIA, with all areas over which any United States jurisdiction might be asserted. The Court ruled that though the high seas were within the admiralty jurisdiction of United States courts, *see The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865), they were not the "territory . . . of the United States" within the meaning of the FSIA. *Amerada Hess*, 488 U.S. at 440.

4. Conflict with the United Nations Charter

The FSIA provides that a foreign state's immunity is "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." 28 U.S.C. § 1604. Appellants contend that Libya's immunity has been displaced by reason of a conflict with the United Nations Charter. Appellants do not assert that any provision of the UN Charter subjects Libya to suit in the United States. Instead, they reason that Article 25 of the Charter binds all member nations to abide by decisions of the Security Council taken under Chapter VII of the Charter and contend that Security Council Resolution 748, adopted on March 31, 1992, commits Libya to pay compensation to the victims of Pan Am Flight 103.

Libya resists this contention on numerous grounds, including the arguments that Resolution 748 is not self-executing, that it was not intended to create judicially enforceable private rights, and that it does not compel payment by Libya. We reject the contention for the threshold reason that the FSIA's displacement of immunity, applicable to international agreements in effect *at the time the FSIA was adopted*, does not contemplate a dynamic expansion whereby FSIA immunity can be removed by action of the UN taken after the FSIA was enacted. Such a contention would encounter a substantial constitutional issue as to whether Congress could delegate to an international organization the authority to regulate the jurisdiction of United States courts. It would take an explicit indication of Congressional intent before we would construe an act of Congress to have such an effect. *Cf. Industrial Union Dep't, AFL-CIO v. American*

Petroleum Institute, 448 U.S. 607, 645-46 (1980) (delegation of Congressional power narrowly construed to avoid constitutional issue). There is no such indication in section 1604.

Conclusion

The bombing of Pan Am Flight 103 was an act of terrorism that has properly drawn the condemnation of the world community. Horrific as that act was, it cannot provide a basis for giving an unwarranted interpretation to an act of Congress simply to achieve a result beneficial to the families of the victims of the bombing. We hold that the FSIA, prior to the recent amendment, does not subject Libya to the jurisdiction of the District Court with respect to the bombing. Whether the recent amendment affords a remedy to some or all of the appellants remains to be determined in subsequent litigation.

The judgment of the District Court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BRUCE SMITH, as personal representative of INGRID SMITH, deceased,

Plaintiff,

-against-

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA *et al.*,

94-CV-5556 (TCP)
MEMORANDUM & ORDER

Defendants.

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PAUL S. HUDSON, as personal representative of the Estate of MELINA K. HUDSON, deceased,

Plaintiff,

-against-

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA,

94-CV-5557 (TCP)
MEMORANDUM & ORDER

Defendant.

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PLATT, District Judge.

Plaintiffs Bruce Smith and Paul Hudson, as personal representatives of victims who died in the bombing of Pan American Airways, Inc. (Pan Am) Flight 103 over Lockerbie, Scotland, on December 21, 1988, seek to

recover civil damages.[1] Smith sues the Socialist People's Libyan Arab Jamahiriya, the Libyan Arab Airlines, The Libyan External Security Organization, Abdel Basset Ali Al-Megrahi and Lamen Khalifa Fhimah as agents and instrumentalities of Libya. Hudson sues the Socialist People's Libyan Arab Jamahiriya (heretofore defendants for both cases are referred to as "Libya").[2] For the purposes of this motion, the claims of Mr. Smith and Mr. Hudson will be considered in tandem. Pursuant to Federal Rule Civil Procedure 12(b), Libya moves this Court to dismiss plaintiffs' claims. Defendants' motion to dismiss both actions is granted as the Federal [sic] Sovereign Immunity [sic] Act precludes the plaintiffs from bringing this action in the United States courts against the State of Libya and its agents.

BACKGROUND

On December 31, 1988, Pan Am Flight 103 left Frankfurt, Germany bound for Detroit with stops in London and New York. At about 7:00 pm, Flight 103 exploded over Lockerbie, Scotland killing all 270 persons aboard, including passengers Mrs. Smith and Mrs. [sic] Hudson.

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[1] Bruce Smith represents the estate of his deceased wife Ingrid Smith. Paul Hudson represents the estate of his deceased wife [sic] Melina K. Hudson.

[2] Since the filing of this Motion to Dismiss, plaintiff Hudson has filed an Amended Complaint in which he sues additional parties. This Court will consider the Motion to Dismiss as to the defendants named in the original complaint, as that was the complaint at issue at the time of the filing of the Motion.

Plaintiff Smith alleges that Pan Am Flight 103 was destroyed by a bomb and that "[t]he actions of Libya in encouraging and sustaining these private acts [of terrorism] led to the deliberate and willful destruction of [the plane]." (Smith Complaint ¶11). Smith asserts tort claims for wrongful death, battery, infliction of emotional distress, loss of consortium and violation of international law. Plaintiff Hudson claims the alleged bomb "was placed on board the aircraft and detonated by and at the direction of Libya . . . . " (Hudson Complaint ¶11). Hudson seeks to recover for the intentional torts of wrongful death and personal injury. (H. Complt. ¶¶15-20).

Mr. Smith and Mr. Hudson have sued previously to recover for the injuries alleged in this matter. In June, 1993, Smith filed a wrongful death action against Libya in Scotland. Hudson joined in the multidistrict tort action (MDL 799) against Pan Am before this Court in which the jury held Pan Am responsible for the destruction of the airplane.

DISCUSSION

Pursuant to FRCP Rule 12(b) the defendants move this Court to dismiss plaintiffs' claims for (i) lack of subject matter jurisdiction under the Foreign Sovereign Immunity [sic] Act (FSIA); (ii) lack of subject matter jurisdiction under principles of International Law; (iii) lack of personal jurisdiction on the grounds of Constitutional due process; (iv) pendency of prior parallel actions; and (v) as time barred.

Plaintiffs contend the FSIA sovereign immunity defense does not foreclose their claims because (i) the United States is party to certain international agreements within the United Nations system which authorize United States Courts to exercise subject matter jurisdiction over Libya; (ii) the injuries tortiously inflicted by Libya occurred in the United States for the purposes of applying the FSIA; and (iii) Libya impliedly waived sovereign immunity under FSIA when it provided a guaranty to pay certain compensation and/or when it violated the *jus cogens* norm.

As the FSIA controls whether a foreign sovereign is to be denied sovereign immunity, this Court only considers the issues raised here in the context of the FSIA. *See, Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in federal court").

A. **Foreign Sovereign Immunity [sic] Act**

The Foreign Sovereign Immunity [sic] Act, 28 U.S.C. §§ 1602-11, provides that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 and 1607 of this chapter." 28 U.S.C. §1604 (1988). The excepted categories which preclude foreign nations from using the sovereign immunity defense are:

> **§1605 General exceptions to the jurisdictional immunity of a foreign state.** 28 U.S.C. §1605 (1988).

(a) A foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect in accordance with the terms of the waiver.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

(3) in which rights in property taken in violation of international law are in issue . . .

(4) in which rights in property in the United States acquired by succession . . .

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance . . . [of] a discretionary function regardless of whether the discretion be abused, or

> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights . . .
>
> **§1607. Counterclaims . . .**

1. Subject Matter Jurisdiction Based on the 28 U.S.C. §1604 Existing Agreement Exception.

As noted, FSIA preserves jurisdiction over a foreign state to the extent such jurisdiction exists under any international agreement to which the United States was a party at the time the statute was enacted. 28 U.S.C. §1604. This "existing agreement" exception "applies when international agreements 'expressly conflic[t] with the immunity provisions of the FSIA.' " *Amerada Hess*, 488 U.S. at 442 (citing and quoting H.R. Rep. No. 94-1487, p. 17 (1976) (H.R. Rep.); S. Rep. No. 94-1310, p. 17 (1976) (S. Rep.)).

a. Time Limit

Plaintiffs assert that the United Nations ("UN") Charter of 1945 (Charter), entered into by the United States prior to the passage of the FSIA in 1976, is an agreement which could preserve jurisdiction over a foreign nation pursuant to §1604.[3] Plaintiffs seek to expand the jurisdiction provided by §1604 to include resolutions passed by the UN Security Counsel [sic], pursuant to Title

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[3] The United Nations Charter "is part of the supreme law of the land." *United States v. Steinberg*, 478 F.Supp. 29, 33 (N.D. Ill. 1979).

VII, regardless of the date of passage, on the theory that such resolutions are "elaborations" of the terms of the Charter and therefore should be accorded the same status as the Charter.[4] U.N. CHARTER art. VII. Specifically, plaintiffs request that Security Council Resolutions 731 and 748, which call on Libya to accept responsibility for the bombing of Pan Am 103, be deemed international agreements which confer jurisdiction under §1604. S. Res. 731, U.N. SCOR, 3033rd Mtg., (1992); S. Res. 748, U.N. SCOR, 3063rd Mtg. (1992).

Security Counsel [sic] Resolutions 731 and 748 do not confer jurisdiction upon this Court as they do not meet the criteria set forth in the "existing agreement" exception in §1604. The plain language of §1604 requires that the international agreement at issue be in existence in 1976 when the FSIA was passed. Security Council Resolutions 731 and 748 were passed in 1992. This Court does not adopt plaintiffs' broad view that because the Resolutions were passed pursuant to powers created by the UN Charter that they are an "elaboration" of the Charter so that this Court should treat them as being passed on the same date as the Charter.

b. Conflict with FSIA Immunity Provisions

Even if the plaintiffs convinced this Court that the Security Council Resolutions related back to the Charter

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[4] **Chapter VII** of the Charter specifies the U.N.'s Police Power.

Article 25 of the Charter provides "[t]he members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

so as to meet the time requirement, plaintiffs claims would fail as Chapter VII of the UN Charter and Resolutions 731 and 748 do not conflict expressly with the FSIA immunity provisions. *See, Id.* Chapter VII addresses the UN's police powers in the face of actual or threatened armed aggression and makes no mention of how victims of such armed aggression can seek civil relief. The Resolutions at issue condemn terrorism and seek to impose diplomatic and economic sanctions against Libya. As neither Chapter VII nor the Resolutions address the FSIA immunity provisions, there is no conflict between the provisions at issue which could provide the basis for jurisdiction.

c. Private Right of Action

If jurisdiction was granted on the basis of the U.N. Resolutions plaintiffs' claims would not survive because the "agreement" at issue creates no private right of action. Plaintiffs argue that the incorporation of S/23308[5] into Resolution 748, which calls on Libya to accept responsibility for the actions of Libyan officials and pay

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[5] S/23308: JOINT DECLARATION OF THE UNITED STATES AND UNITED KINGDOM

The British and American Governments today declare that the Government of Libya must:

– surrender for trial purposes all those charged with the crime; and accept responsibility for the actions of Libyan officials:

– disclose all it knows of this crime . . .

– pay appropriate compensation.

We expect Libya to comply promptly and in full. G.A. S/23308, U.N. GAOR, 46th Sess., U.N. Doc. A/46/827 (1991).

appropriate compensation, provides the basis for a private right of action against Libya for the victims of Pan Am #103.

"Treaties of the United States, though the law of the land do not generally create rights that are privately enforceable in courts." *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir.), (Bork, J. concurring) (citations omitted), *cert. denied*, 470 U.S. 1003 (1985). If there is no legislation providing an individual right of action, the Court may entertain a private claim only if the treaty is self-executing.[6] *Id.* (citations omitted). To determine if a treaty is self-executing the court examines "the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must [be determined by examining] the circumstances surrounding its execution." *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (citing *Sei Fuji v. State*, 38 Cal.2d 718, 721-22, 242 P.2d 617, 620 (1952)).[7] The *Diggs* action was not viable because the provisions of the Resolution "were not addressed to the judicial branch of our government . . . [and did not] by their terms confer rights upon individual citizens." *Id.* Rather, "they call[ed] upon governments to take certain action." *Id.*

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[6] A treaty is self-executing when it expressly or impliedly provides a private right of action.

[7] *Diggs v. Richardson* considered whether a Security Council Resolution is self-executing. The Court found individual plaintiffs could not maintain a suit against the United States when the U.S. allegedly violated Security Council Resolution 301, which prohibited certain relations with South Africa.

Upon a careful reading of Chapter VII of the UN Charter and Security Counsel [sic] Resolutions 731 and 748, this Court holds that the Resolutions are not self-executing. As noted above, the Resolutions at issue condemn terrorism and impose economic and diplomatic sanctions against Libya. This Court finds that the primary purpose of S/23308 is to demand Libya participate in the criminal investigation of the Lockerbie disaster. The vague directive that Libya must "pay appropriate compensation" does not refer to our judiciary system or confer upon an individual the right to sue Libya to recover "appropriate compensation." *Cf., Amerada Hess*, 488 U.S. at 442 (The fact the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs does not create private rights of action.)

2. **Subject Matter Jurisdiction Based on the 28 U.S.C. §1605(a)(2) Commercial Activity Exception.**

FSIA §1605(a)(2) grants an exception from sovereign immunity for claims based on commercial activity by the foreign nation that has a sufficient connection to the United States. As the plaintiffs' seek recovery for solely tortious injury, the commercial activity exception is not applicable in this case.[8]

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[8] The plaintiffs included this claim in their complaint but did not argue it in the Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss. This Court interprets the plaintiffs' decision not to include this matter in their motion papers as an indication of the weakness of this claim.

3. Subject Matter Jurisdiction Based on the 28 U.S.C. §1605(a)(5) Non Commercial Tort Exception.

As noted above, §1605(a)(5) denies foreign sovereign immunity in any case "in which money damages are sought against a foreign state for personal injury occurring in the United States and caused by the tortious act or omission of that foreign state. . . . " Defendants contend that the plaintiffs' case does not meet the requirement that the injury occur in the United States because Pan Am Flight 103 exploded in Scottish airspace and crashed on Scottish soil. Plaintiffs response is that the strict locality test should not be used in aviation cases and that as Pan Am was an American airline the plane was actually part of the United States.

a. Strict Locality Test

Plaintiffs claim that airplanes are "geographically unrestrained" so that the locality rule should be replaced with a flexible analysis, analogous to either maritime law principles or the modern approach for deciding conflicts of laws issues,[9] to determine where an aviation disaster

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[9] §145 of the Restatement of Conflicts of Law, Second provides the basis for the modern approach to conflicts law.

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in §6.

(footnote continued on next page)

occurred for the purpose of assigning jurisdiction. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249, 266-68 (1972) (In both death and injury cases . . . it is evident that while distinctions based on locality often are . . . relevant where water vessels are concerned, they entirely lose their significance where aircraft . . . are concerned." (quoting 7A J. Moore, *Federal Practice, Admiralty* ¶ .330(5), at 3772-3 (2d ed. 1972)).

Plaintiffs' reliance on the reasoning employed in *Executive Jet* to come to the conclusion that the locality rule should not be applied in aviation tort cases is unfounded. The *Executive Jet* case wrestled with the issue of whether maritime tort law should apply when a domestic flight crashes into navigable waters within state territorial limits and in determining that issue the Court discussed the random nature of the location of aviation accidents. 409 U.S. at 261-65. That case does not reach the issue of how to determine jurisdiction if the plane crashes over land and it does not touch upon the issue of foreign

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(2) Contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:

(a) the place where the injury occurred.

(b) the place where the conduct causing the injury occurred.

(c) the domicil [sic], residence, nationality, place of incorporation and place of business of the parties,

(d) and the place where the relationship, if any, between the parties is centered.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

sovereign immunity. Furthermore, the admiralty jurisdiction of the federal courts in relation to foreign governments in [sic] now ruled by the FSIA, which was not in effect in 1972 when the *Executive Jet* decision was rendered. 28 U.S.C. §1605(b); *Amerada Hess*, 488 U.S. at 438.

The remainder of the cases relied upon by the plaintiffs relate to issues of conflicts of law which arise from domestic aviation disasters. *See, In Re Air Crash at Washington. D.C.*, 559 F. Supp. 333, 340-42 (D.C. Cir. 1983) (which state's law should apply when residents of various states are involved in the same disaster); *O'Keefe v. Boeing Company*, 335 F. Supp. 1104, 1110-11 (S.D.N.Y. 1971) (which state's conflicts law should apply when an Air Force plane stationed in Massachusetts crashed in Maine and the wrongful death action was brought in New York). In accordance with plaintiffs' use of conflicts of law principles they claim that because the plane was destined for the United States, Pan Am was an American airline and the majority of passengers were citizens of the United States the situs of the tort was actually the United States.

This Court finds plaintiffs' call for a flexible approach for determining the location of an international aviation tort for the purposes of determining jurisdiction unpersuasive as the law to be applied in this action is the FSIA, not federal maritime law or conflicts law. The plain language of §1605(a)(5) states that foreign immunity is excepted only when the tort occurs in the United States. The Supreme Court restricts the definition the "United States" for the purposes of this statute to "the continental United States and those islands that are part of the United States or its possessions. . . . " *Amerada Hess*, 488 U.S. at

440. As this flight exploded above Lockerbie, Scotland and crashed into Scottish soil, and there is no authority which stands for the proposition that the locality test should not be used, this Court finds this tortious injury was inflicted in Scotland, not the United States.

b. **Pan Am Flight 103 as "Territory" of the United States**

Plaintiffs seek to expand the maritime law principle that ships are the territory of their flag nation to include commercial airplanes. *See, e.g., United States v. Flores*, 289 U.S. 137, 155 (1933) ("a merchant vessel . . . is deemed to be a part of the territory" of "the sovereignty whose flag it flies."); *United States v. Cordova*, 89 F. Supp. 298, 302 (E.D.N.Y. 1950) ("American flag vessel is itself territory of the United States"). Applying this territorial approach, the plaintiffs argue that Pan Am Flight 103 was American territory so that the tortious activity injury inflicted on Mrs. [sic] Hudson and Mrs. Smith "occurred in the United States."

Adopting plaintiffs' approach would require this Court to expand Supreme Court precedent and overstep the bounds of judicial authority. As noted above, for the purpose of enforcing the FSIA the Supreme Court has defined the United States as "the continental United States and those islands that are part of the United States or its possessions. . . . " *Amerada Hess*, 488 U.S. at 440. This Court has no authority to broaden that clear definition to include American commercial aircraft. If this Court were to rule in plaintiffs' favor it would be interfering with foreign relations as each nation has the right to

regulate the land on which a distressed plane might crash and its own air space. *See, e.g.*, 49 U.S.C. §1348 (1988) (authorizing Secretary of Transportation to regulate use of navigable air space). This Court reiterates that the tortious injury suffered in this case occurred on foreign soil and therefore does not fall within the non-commercial tort exception to the FSIA.

4. Subject Matter Jurisdiction Based on an Implied Waiver Pursuant to 28 U.S.C. §1605(a)(1).

According to §1605(a)(1), a foreign state can waive immunity "either explicitly or by implication . . . . " In interpreting the FSIA "[f]ederal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) . . . is to be construed narrowly. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2nd Cir. 1991). Plaintiffs claim that Libya impliedly waived immunity when (1) Libya agreed to guaranty satisfaction of any civil damage awards against its operatives as a result of the bombing of Pan Am Flight 103 and (2) when Libya acted in a "non-sovereign" manner.

a. The Guaranty

On February 27, 1992, Ibrahim M. Bishari, Secretary of the Libyan government's "People's Committee for Foreign Liaison and International Cooperation," sent a letter to the Secretary of the United Nations which stated:

> Despite the fact that discussion of the question of compensation is premature, since it would only follow from a civil judgment based on a

> criminal judgment, Libya guarantees the payment of any compensation that might be incurred by the responsibility of the two suspects who are its nationals in the event that they are unable to pay. S/23672, Report of Secretary-General (1992).

The plaintiffs contend this guaranty necessarily means that Libya contemplated the possibility of being haled into an United States court and therefore impliedly waived its right to sovereign immunity.

This Court disagrees with plaintiffs' self-serving interpretation of Mr. Bishari's letter. The above quoted clause indicates the Libyan government only agrees to guaranty civil damages which the Libyan criminal suspects cannot afford to pay when and if those suspects are convicted of criminal activity. The letter, read in totality, makes it clear that Libya does not intend to activate the provisions of that letter unless and until certain conditions are met. Specifically, the correspondence states "[t]he proposals contained in this draft shall be binding [when] . . . State terrorism against Libya shall end, there shall be a halt to threats and provocations against it . . . the economic boycott shall be ended . . . and its name shall finally be removed from the roster of terrorism." S/23672. As those conditions have not been met, this letter does not represent a true "international agreement" and therefore no provision therein can create an implied waiver of sovereign immunity.

Even if the Libyan government had guaranteed civil damages it does not necessarily follow that this Court

would find Libya had impliedly waived its right to sovereign immunity pursuant to FSIA. "[B]y signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States" a foreign nation may not waive its immunity pursuant to §1605(a)(1). *Amerada Hess*, 488 U.S. at 442-43. As the letter makes no reference to our judicial system or the creation of a private right of action to be adjudicated in the United States, it does not necessarily impliedly waive Libya's right to immunity.

b. **Violations of the *Jus Cogens* Norm**

To interpret the language of §1605(a)(1) plaintiffs argue that the implied waiver of immunity provision codified pre-FSIA case law which held a state is divested of its sovereign character, including immunity, when it participates in non-sovereign acts. *See, United States v. Deutches Kalisyndikat Gesellschaft*, 31 F.2d 199, 203 (S.D.N.Y. 1929) (The Government of France's role as a shareholder in a private French corporation was not sovereign activity so that the corporation was not immune from suit in the United States). To define those acts which amount to an implied waiver plaintiffs look to "standards recognized under international law." H.R. Rep. No. 1487, 94th Cong., 2d Sec. 18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617. Particularly, plaintiffs assert that Libya's alleged involvement in this bombing impliedly waived immunity as it was a non-sovereign action in the form of a violation of the *jus cogens* norm.

Jus cogens norm is an international law principle which is "accepted by the international community of States as a whole as a norm from which no derogation is permitted . . . " *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) (quoting Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N.Doc. A/Conf. 39/27, 8 I.L.M. 679). *Jus cogens* violations include "a handful of heinous activities – each of which violates definable, universal and obligatory norms." *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring).

There is no authority which provides federal courts with the discretion to determine whether a nation has impliedly waived immunity by examining if that nation was acting in a "sovereign" or "non-sovereign" manner. The legislative history indicates that to decide whether immunity is impliedly waived courts are to inquire as to the foreign government's subjective intent to avail itself to American jurisdiction. *Shapiro*, 930 F.2d at 1017. Congress provided three examples of activity which would warrant the finding of an implied waiver: (1) an agreement to arbitrate in another country, (2) an agreement that the laws of another nation will govern a contract, and (3) the filing of a responsive pleading without raising the sovereign immunity defense. *Id.* (citing H.R. Rep. No. 1487, 94th Cong., 2d Sec. 18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617). As the instant case is not analogous to these three examples and because participating in "terrorist" activity does not indicate a foreign sovereign's amenability to suit, Libya has not impliedly waive [sic] its immunity pursuant to §1065(a)(1).

The District of Colombia [sic] Circuit recently determined that the violation of the *jus cogens* norm is not an implied waiver of sovereign immunity. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir.), *cert. denied*, 115 S.Ct. 923 (1995). That case concerned an American Jewish Holocaust survivor who was seeking to sue Germany for war reparations. *Id.* at 1168. The Circuit Court found the atrocities inflicted in the Nazi concentration camps were definitely horrendous violations of the *jus cogens* norm, but that such actions did not create an implied waiver of sovereign immunity as neither the Third Reich nor the modern German government ever indicated "its amenability to suit." *Id.* at 1168-69, 1174. This Court adopts the reasoning in *Princz*. Libya's alleged behavior was inhumane and violative of the *jus cogens* principle, but such actions do not demonstrate that Libya purposefully availed itself to our courts.

CONCLUSION

Although Libya's alleged participation, if true, in this tragedy is outrageous and reprehensible and the human suffering involved is heartbreaking, this Court may not rightly obtain jurisdiction over Libya for the purposes of these private rights of action. Libya's alleged terrorist actions do not fall within the enumerated exceptions to the Foreign Sovereign Immunity [sic] Act and therefore Libya must be accorded sovereign immunity from suit.

SO ORDERED.

/s/ Thomas C. Platt
District Judge, U.S.D.C.

Dated: Uniondale, New York
May 17, 1995

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- X

BRUCE SMITH, as personal representative of INGRID SMITH, deceased

1262 Harbor Point Drive
Port Orange, Florida 32127

Plaintiff,

-against-

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, A/K/A JAMAHIRIYA SECURITY ORGANIZATION; LIBYAN ARAB AIRLINES; ABDEL-BASSET ALI AL-MEGRAHI, A/K/A ABDELBASET ALI MOHMED, A/K/A ABDELBASET ALI MOHMED AL MEGRAHI, A/K/A "MR. BASET," A/K/A AHMED KHALIFA ABDUSAMAD, A/K/A ABD AL-BASIT AL-MAQRAHI; LAMEN KHALIFA FHIMAH, A/K/A AL AMIN KHALIFA FHIMAH, A/K/A "MR. LAMIN"

Defendants.

---------- X

AMENDED JUDGMENT (PARTIAL)

CV-94-5556 (TCP)

A judgment having been entered on May 31, 1995 dismissing this action in its entirety in accordance with the memorandum and order of Hon. Thomas C. Platt, United States District Judge, filed on May 18, 1995; a memorandum and order of Hon. Thomas C. Platt, United States District Judge, having been filed on June 15, 1995, ordering that the action remain pending as to two individual defendants ABDEL BASSET ALI AL-MEGRAHI and LAMEN KHALIFA FHIMAH since they did not join in the motion to dismiss filed by the other defendants; and a certification under Fed. R. Civ. Proc. 54(b) having been signed by Judge Thomas C. Platt on July 20, 1995, directing that judgment be entered dismissing the plaintiff's claims against The Socialist People's Libyan Arab Jamahiriya, the Libyan External Security Organization and Libyan Airlines; it is

ORDERED and ADJUDGED that the plaintiff BRUCE SMITH, as personal representative of INGRID SMITH, deceased, take nothing of the defendants, THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, LIBYAN EXTERNAL SECURITY ORGANIZATION, A/K/A JAMAHIRIYA SECURITY ORGANIZATION, LIBYAN ARAB AIRLINES; and that this action is hereby dismissed as to those defendants listed herein.

DATED: Uniondale, New York
September 15, 1995

ROBERT C. HEINEMANN
Clerk of the Court

By: /s/ Joseph Di Talia
JOSEPH DI TALIA
Deputy Clerk-in-Charge

APPENDIX D

Bruce Smith v. The Socialist People's Libyan Arab Jamahiriya, et al.

Court TV Coverage of Oral Argument before the United States Court of Appeals for the Second Circuit on March 28, 1996

Excerpts of Argument re Implied Waiver by Operation of Law

Chief Judge Newman:	When you argue for implied waiver by operation of law, do you mean that this statute that Congress has passed subjects a state to liability in a U.S. court, whether or not the state *intended* that it should be subject to suit?
Mr. Russell:[1]	I think the answer is yes, Your Honor. What we maintain is . . .
Chief Judge Newman:	What has been referred to as an intentionality element by the D.C. Circuit . . .
Mr. Russell:	Correct, Your Honor . . .
Chief Judge Newman:	You disagree that that's an element of the statute.
Mr. Russell:	We maintain that there is no requirement of an actual subjective intent on the part of a state in a particular case to have waived immunity.

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[1] Timothy C. Russell argued for plaintiff-appellant Bruce Smith.

Chief Judge Newman: So is it, rather than being a waiver, is it more in your view like a forfeiture? If you do certain things, the law ascribes to you a consequence.

Mr. Russell: In effect, Your Honor, but I think the law is . . .

Chief Judge Newman: And you think that's what Congress meant when they used the phrase "implied waiver"?

Mr. Russell: I think that's what Congress meant. I also think it's very plain, Your Honor, that Congress didn't say that implied waivers by operation of law may not be found under the Foreign Sovereign Immunities Act. Implied waivers by operation of law are common in the law, they are common in the law of sovereign immunity. The *Planters' Bank* case suggests that *The Schooner Exchange*, the very sovereign immunity itself, if one goes back to the Supreme Court's decision in *The Schooner Exchange* in 1812, the Court made clear that sovereign immunity itself is a matter of the host state impliedly by operation of law waiving its exclusive right to exercise territorial, plenary territorial jurisdiction over other sovereigns that come within that territory.

Chief Judge Newman: Do the examples that the House Report gave, as examples of implied waiver, seem to you to be on the intentionality side of the line or on the forfeiture side of the line?

Mr. Russell: I think the three examples that are contained in the legislative history tend, I would characterize those as examples of intent of waiver in fact, implied waiver in fact, that is waivers where a court could conclude that there was an actual subjective intent to waive. There is nothing in those three examples or anywhere else in the legislative history, Your Honor, . . .

Chief Judge Newman: You think those *are* intentionality examples?

Mr. Russell: I think they are. I think it's fair to characterize them more as intentionality waivers, Your Honor, but I don't think there is anything in the legislative history. Those were historical examples. All Congress said in the legislative history is here are three examples of where courts have historically, in other cases, found implied waivers. Nothing in the legislative history suggests these are the only types of examples, or types of instances, in which an

implied waiver may be found. There is no *ejusdem generis* sense to the legislative history. Congress, I don't think, suggested those three examples were limiting at all.

Chief Judge Newman: One is when they designate the applicable law.

Mr. Russell: Designate the applicable law of a particular nation. That's correct, Your Honor and another is . . .

Chief Judge Newman: I would have thought it's at least an open question whether the country designating the applicable law meant to make itself suable anywhere, or anywhere where there is personal jurisdiction

Mr. Russell: well

Chief Judge Newman: or simply meant you can sue us in our own courts, and in our own courts we agree the choice of law issue will be decided according to the designated law.

Mr. Russell: Your Honor, my point is there is to me an element of subjectivity in the three examples. But I agree with the Court that it's neither Congress nor any of the courts applying 1605(a)(1) have ever required before an implied waiver in fact may be found, that there be in effect an

express waiver, but they have required I think and I think those three examples do include some element of evidence, if you will, from which one can infer that there is advertence on the part of the sovereign nation to the prospect of litigation, to the prospect of jurisdiction, to the prospect of judicial proceedings. We have made an implied waiver in fact argument, with respect to Libya's compensation commitment, given by Libya after the Security – the first of the Security Council Resolutions was adopted. And we think that if that commitment is looked at carefully there clearly is on the face of it, the evidence that Libya was adverting to the prospect of litigation in United States courts. I can't stand before this Court and say that as a matter of fact, and as a matter of subjective intent, that Libya, before it ordered the destruction of the Pan Am Flight 103 and committed that non-sovereign act, actually adverted, or that we would be able to prove that it did actually advert as a matter of fact to the prospect that that act would result in it being haled into United States courts.

But as a matter of law, and by operation of law, it seems to me an argument is, that what Libya did in committing that act was to engage in conduct that sovereign nations have all agreed, and it is universally agreed among the community of nations, sovereign nations may not engage in and implicitly when a nation does that, a nation forfeits and maybe forfeiture is as appropriate.

Chief Judge Newman: Well, that's the act itself, not the payment guaranty?

Mr. Russell: That's correct, Your Honor.

Counter:10:28 – 16:14.

* * *

Mr. Bartels:[2] Basically, what both the D.C. Circuit and the Ninth Circuit said was that if a *jus cogens* violation is to constitute an exemption to the Foreign Sovereign Immunity Act, it's up to Congress to decide that and . . .

Chief Judge Newman: Yes, but that's our question. Whether in talking about implied waiver they have

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[2] John R. Bartels, Jr. argued for defendants-appellees The Socialist People's Libyan Arab Jamahiriya, the Libyan External Security Organization, and Libyan Arab Airlines.

decided it in favor of the plaintiffs. We have got the phrase, the question is what does the phrase mean.

Mr. Bartels: Well, the phrase certainly cannot mean that Libya – assuming these facts to be true, impliedly waived and agreed to be sued in the courts of the United States. Assuming these facts to be true, the acts were so horrendous that the last place Libya would want to be sued would be in the United States. There is no intent in a violation of *jus cogens*.

Chief Judge Newman: But that also raises, it seems to me, the question rather than the answer. You just put it – it didn't evidence their intent and that's the first thing I asked Mr. Russell was, does implied waiver require intent. His view is it does not. I take it . . .

Mr. Bartels: Well, the very word waiver as defined means an intentional relinquishment of a right of some sort.

Chief Judge Newman: But haven't our courts going all the way back to the *Planters' Bank* case said that there are certain things a state does that causes it to lose its sovereign immunity wholly apart from what is in the minds of the

state officials who make the decision?

Mr. Bartels: Not under the Foreign Sovereign Immunity Act. And foreign courts . . .

Chief Judge Newman: Well, let's come to that . . .

Mr. Bartels: Immunity and jurisdiction is different than certain other areas in that –

Chief Judge Newman: All right, can we at least agree that before the Act was passed there was a Supreme Court decision saying a foreign state that has sovereign immunity loses that sovereign immunity when it does certain things like engage in commercial activity?

Mr. Bartels: Yes, that is correct.

Chief Judge Newman: And wasn't that said wholly apart from intention?

Mr. Bartels: I don't know whether it was said wholly apart from intention.

Chief Judge Newman: Well, you can read the opinion and I think you won't find a word where, I think it was John Marshall, said it is obvious here the state intended to subject itself . . .

Mr. Bartels: Let me assume that is true, and I am perfectly willing to because I am ignorant of it, I am not arguing with it.

Chief Judge Newman: Well, if we start from that, that before the Act there were instances of an adjudicated loss of sovereignty without the subjective intent of the state or its high ranking officials.

Mr. Bartels: Let's take that assumption . . .

Chief Judge Newman: Then the question is when Congress comes along in this century and says a state loses its sovereignty when it expressly (we know what that means) or impliedly waives, did they mean to pick up that earlier body of law that recognized some unintentional abandonments of sovereignty or did they only mean the intentional one. That's really our threshold, isn't it?

Mr. Bartels: It's our view that they meant only the intention.

Chief Judge Newman: And what supports that?

Mr. Bartels: The support is both the language of the waiver as opposed to estoppel, the legislative history with the three examples that Your Honor mentioned earlier of a nation being willing to adopt the law of the United States, being willing to accept arbitration in the United States, or filing a response to a pleading to a suit in the United States and not exercising its

sovereign immunity or defending it.

Chief Judge Newman: Why does accepting the law of the United States, or any country, indicate that a country is willing to be sued in the courts of that state?

Mr. Bartels: It was one of the examples that the committee put forth as evincing an indication by that sovereign nation, that if a nation agreed to accept the law of a foreign nation, it would therefore be willing to waive its immunity to suit in that nation. I can imagine cases where accepting the law of a nation might not evince such an indication or such an intent, but the point of . . .

Chief Judge Newman: Well, even if that is so, that the consequence, if they draw a contract of any sort and they say any interpretation of this contract shall be governed by the law of the United States, and then they're sued in the United States and they plead sovereign immunity and you would, I take it, agree from that example they get sued in the United States.

Mr. Bartels: Yes, I think they probably do under that . . .

Chief Judge Newman: Now supposing it was crystal clear that when they drew that contract there was some internal memoranda between the Premier and State Department of the other country and it said – by agreeing that U.S. law applies are we agreeing to be sued there and the Secretary of State said not a chance. We are only going to be sued in our country, meaning their own. So we had clear evidence of what their intent was, I take it you would agree notwithstanding that evidence of intent, by agreeing to U.S. law being applicable they are subject to U.S. courts whether they intended it or not.

Mr. Bartels: I am not sure that that's true. I would think a court would determine the intent to waive immunity on the basis of the foreign sovereign's actions, not its various internal memoranda back and forth between various members of the government.

Chief Judge Newman: Well, would it follow then that if the court did what you suggest and took testimony and concluded that it was the intent of that state to be sued only in its own courts, albeit with foreign law applicable as choice of law, then the state would not be

subject to suit under the FSIA in our courts.

Mr. Bartels: The very purpose of the Foreign Sovereign Immunity Act is to avoid this internal inquiry into the subjective intent of foreign states. We can only imagine . . .

Chief Judge Newman: That's what I am suggesting. That the identification of foreign law as the triggering – the agreement that foreign law shall apply as a triggering mechanism for subjection to suit renders you subject to suit regardless of your intent.

Mr. Bartels: It may very well.

Chief Judge Newman: Well, if that is so, then intentionality can't be a universal requirement.

Mr. Bartels: No. Regardless of your internal subjective intent it is deemed to be the objective intent.

Chief Judge Newman: Well, deemed to be your intent sounds very close to the language the law uses when it talks about a forfeiture. You do act "A" and you are deemed to suffer a consequence. Whether it was in your head or not.

Mr. Bartels: I would respectfully disagree because if you – it is not uncommon if you agree in commercial matters to be subject to

the law of Nigeria that those best able to determine the law of Nigeria would be judges in Nigeria so that the statement or the intentional act of a sovereign to subject itself to the law of a nation implies a willingness to be judged by those judges best qualified. It's a . . .

Chief Judge Newman: What would you do with a contract that France makes – to try to take it away from the emotionalism of Libya – France makes a contract and says, with a commercial trader, we agree in the event of any dispute under this contract the law of Germany shall govern, but we do not thereby relinquish our normal sovereign immunity and we insist on being sued only in the courts of France.

Mr. Bartels: I would think then that the very language indicates no intent to waive immunity. That the language . . .

Chief Judge Newman: Therefore, if it arose in the United States, there would be no implied waiver.

Mr. Bartels: I think that's right.

Chief Judge Newman: I see.

Counter: 34:30 – 35:50; 39:42 – 46:22; 46:50 – 47:35.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

M. VICTORIA CUMMOCK, in her own right, and as personal representative of the ESTATE of JOHN CUMMOCK, deceased,

-and-

CHERRY PEIRCE, in her own right, and as personal representative of the ESTATE of PETER PEIRCE, deceased,

and all other similarly situated,

Plaintiffs,

v.

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, LIBYAN EXTERNAL SECURITY ORGANIZATION, A/K/A JAMAHIRIYA SECURITY ORGANIZATION, LIBYAN ARAB AIRLINES, ABDEL-BASSET ALI AL-MEGRAHI, A/K/A MR. BASSET, A/K/A AHMED KHALIFA ABUSAMED, A/K/A ABD AL-BASIT AL-MAQRAHI, and LAMEN KHALIFA FHIMAH, A/K/A AL AMIN KHALIFA FHIMAH, A/K/A MR. LAMIN,

Defendants.

96-CV-2993 (TCP)

ANSWER

Defendants, THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA, LIBYAN EXTERNAL SECURITY ORGANIZATION, A/K/A JAMAHIRIYA SECURITY ORGANIZATION and LIBYAN ARAB AIRLINES, by their attorneys, Mirone & Shields, as and for their Answer to the purported First Amended Class Action Complaint of Plaintiffs herein, the "Complaint" on information and belief, allege as follows:

* * *

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

64. The Complaint should be dismissed upon the ground that the Court lacks jurisdiction over the Answering Defendants which are foreign sovereigns or the agents or instrumentalities of foreign sovereigns entitled to immunity.

* * *

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

69. The 1996 amendments to the Foreign Sovereign Immunities Act are constitutionally deficient and without force and effect.

* * *

WHEREFORE, the Answering Defendants demand judgment dismissing the Complaint as against them together with costs, disbursements and expenses and that the Answering Defendants and each of them receive such other, further and different relief as the Court may find proper.

Dated: New York, New York
November 26, 1996

Respectfully submitted,

Mirone & Shields
By: /s/ Robert C. Mirone
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